UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIDNEY BLUMENTHAL and JACQUELINE JORDAN BLUMENTHAL, Plaintiffs, v. MATT DRUDGE, Defendant.	)	Civil Action No. 97-1968 (PLF)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant Drudge's special motion to strike plaintiffs' complaint. Defendant contends that plaintiffs' suit is meritless and that he therefore is entitled to dismissal of the action under California law. Plaintiffs respond that according to their choice of law analysis, California law is inapplicable in this action. Even if California law did apply, plaintiffs believe that dismissal is inappropriate because they are entitled to discovery under the Federal Rules of Civil Procedure before the Court considers any summary resolution of this case. Upon consideration of the arguments presented by the parties and the Court's own analysis of California law, the Court will deny the special motion to strike plaintiffs' complaint.

I. BACKGROUND

Plaintiffs Sidney and Jacqueline Jordan Blumenthal have brought this suit against defendant Matt Drudge for allegedly defamatory statements published on defendant's Internet website on August 10, 1997. The facts of this case have been summarized by the Court in two previous opinions and do not need to be repeated here. See Blumenthal v. Drudge, 186 F.R.D. 236, 238-40 (D.D.C. 1999); Blumenthal v. Drudge, 992 F. Supp. 44, 46-48 (D.D.C. 1998).

On October 31, 2000, the Court heard argument on defendant's motion for judgment on the pleadings. Defendant argued that the case should be dismissed as a matter of law because plaintiffs could not prove defamation. The Court denied the motion. The Court also ordered that before plaintiffs could depose Mr. Drudge to learn the sources for his story, they first must depose those individuals identified as possible alternative sources of such information. See November 17, 2000 Order at 1-2. The Court referred all discovery disputes to Magistrate Judge John M. Facciola and ordered the parties to contact Judge Facciola's Chambers before scheduling depositions so that he could be available either by telephone or in person to deal with any disputes that may arise during the depositions. See id. at 2-3. After consulting with Judge Facciola's Chambers, plaintiffs scheduled depositions for February 14 and 15, 2001 in Washington, D.C. On January 31, 2001, defendant filed his special motion to strike plaintiffs' complaint.[1] Defendant contends that the lawsuit filed by the Blumethals is a SLAPP ("Strategic Lawsuit Against Public Participation") action and therefore should

[1] Along with the special motion to strike, defendant filed a motion for a protective order and to quash the depositions scheduled for February 14 and 15, 2001, and a motion to shorten the time in which to consider the motion for a protective order and to quash the depositions. The motion to shorten time was granted, but because plaintiffs rescheduled the depositions in question, defendant's motion for a protective order and to quash the depositions was rendered moot.

be dismissed pursuant to California's Anti-SLAPP statute. See Cal. Civ. Proc. Code § 425.16 (West 2001).

II. DISCUSSION

California's Anti-SLAPP statute is a procedural rule designed "to provide for the early dismissal of meritless suits aimed at chilling the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp.2d 1127, 1128 (N.D. Cal. 1999). See also United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970-71 (9th Cir. 1999); Wilcox v. Superior Court, 33 Cal. Rptr.2d 446, 449-50 (Cal. Ct. App. 1994). The California legislature explicitly enacted the statute to respond to what it saw as a

> disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

Cal. Civ. Proc. Code § 425.16(a). Under the Anti-SLAPP statute, a defendant may file a special motion, but to succeed on the motion he first must meet his *prima facie* burden of showing that the suit arises out of the exercise of his right of petition or free speech. See Cal. Civ. Proc. Code § 425.16(b)(1). If the defendant carries this burden, the plaintiff must demonstrate through the pleadings and affidavits that there is a probability he will prevail on the claim. See id. § 425.16(b)(1), (b)(2). Failure to do so results in the dismissal of the lawsuit and the awarding of attorneys' fees and costs to the defendant. See id. § 425.16(b)(1), (c). Through the invocation of this statute, the defendant can

obtain early dismissal of a lawsuit before substantial time and expense is incurred defending against meritless First Amendment-chilling litigation.

Defendant Drudge argues that the Anti-SLAPP statute should be applied in this case. He contends that plaintiffs will be unable to prevail in this matter because they "are both public figures . . . and must show by clear and convincing evidence at trial that the material published by Drudge was defamatory, and was published with 'actual malice.'" December 28, 2000 Order Granting Defendant Matt Drudge's Motion to Amend the Court's November 17, 2000 Order. He also contends that plaintiffs have no evidence to support their claim of defamation against defendant. Plaintiffs oppose the special motion, arguing that the statute should not apply under their choice of law analysis and that even if it did apply, they should be allowed the opportunity to conduct discovery to assist them in establishing the probability that they will prevail at trial. See Metabolife International, Inc. v. Wornick, 72 F. Supp.2d 1160, 1166 (S.D. Cal. 1999)

The Court will assume for the purposes of deciding the special motion that the California Anti-SLAPP statute does apply in this case. The statute states that the special motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Cal. Civ. Proc. Code § 425.16(f). Although the statute states that the special motion "may" be filed within 60 days and not that it "must" be filed within that time, Section 425.16(f) has been interpreted by both federal and state courts in California to require filing within 60 days of the complaint or amended complaint unless otherwise permitted by the court in its discretion. See Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp.2d at 1129; Rogers v. Home Shopping Network, 57 F. Supp.2d 973, 975-76 (C.D. Cal. 1999); Wilcox v. Superior Court, 33 Cal. Rptr.2d at 454; see also Eric E. Younger & Donald E. Bradley, YOUNGER ON CALIFORNIA MOTIONS

§ 14.38 (2000).[2] A requirement that the motion to strike be filed soon after the filing of the complaint best serves the purpose of the Anti-SLAPP statute – to provide for the early dismissal of meritless First Amendment-chilling lawsuits. See Wilcox v. Superior Court, 33 Cal. Rptr.2d at 454-55 (early filing of special motion to strike allows "fast and inexpensive unmasking and dismissal of SLAPPs," benefitting defendant, court and public). The 60 day period for filing the special motion has long since expired in this case. Plaintiffs filed their complaint on August 27, 1997, and defendant did not file the special motion until January 31, 2001, well over three years past the expiration of the 60 day period. The question under the statute, then, is whether the Court should exercise its discretion to permit filing out of time.

Defendant's own actions in this case strongly suggest that the failure to file the special motion within 60 days should not be excused by the Court in the exercise of its discretion. Putting aside relatively inconsequential motions, such as motions for enlargements of time, defendant Drudge has actively litigated this case from the beginning and has already filed two dispositive motions: (1) a motion to dismiss filed on October 27, 1997, and (2) a motion for judgment on the pleadings filed on December 15, 1999.[3] Despite the filing of these motions and his active involvement in discovery and

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[2] Reading Section 425.16(f) as a whole, it is logical to interpret it as requiring the filing of the special motion within 60 days. If the first clause is not read as a restriction on when the special motion may be filed, the second half of the provision giving the Court discretion to allow the motion to be filed "at any later time upon terms it deems proper" would make no sense. Providing the court with such discretion is logical only if the 60 day time period acts as a limitation on when the special motion must be filed.

[3] Although the motion to dismiss mentions the California Anti-SLAPP statute and suggests that the statute may be applicable in this case, at that time defendant did not file a special motion to strike under the Anti-SLAPP statute or request dismissal on that basis; he only argued that the case should be dismissed for lack of personal jurisdiction. See Memorandum of Points and Authorities in Support of Defendant Matt Drudge's Motion to Dismiss for Lack of Personal Jurisdiction and Alternative Motion to Transfer for Convenience and in the Interest of Justice at 2-3.

litigation relating to discovery, defendant inexplicably has waited until this late date to file his special motion to strike. Defendant himself has aggressively sought discovery from plaintiffs in the form of requests for production of documents, interrogatories and the depositions of both Mr. and Mrs. Blumenthal – depositions that took several days and are still not concluded and that involved extensive litigation before this Court. See Blumenthal v. Drudge, 186 F.R.D. at 240-42. On October 7, 1998, defendant even filed a motion to compel, seeking the production of additional documents, interrogatory and deposition responses, and discovery sanctions against plaintiffs. See id. at 238, 240-42. If this suit were really the type of meritless action suitable for early dismissal under the Anti-SLAPP statute, then defendant should have filed this special motion long ago; defendant's actions in this litigation have pushed this suit beyond the point where the special motion should be allowed in the exercise of the Court's discretion.

Finally, the Court concludes that this suit does not appear to be the type of action that the California legislature had in mind when it enacted the Anti-SLAPP law. SLAPP suits are often brought for "purely political purposes" in order to obtain "an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." Rogers v. Home Shopping Network, Inc., 57 F. Supp.2d at 974 (citation omitted). As one court has observed:

> [O]ne of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished. . . . Thus, while SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to

> punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs.

Wilcox v. Superior Court, 27 Cal. Rptr.2d at 449-50 (citations omitted). The suit filed by the Blumethals bears little resemblance to this description. While the law of defamation as applied to public figures will make it difficult for the plaintiffs ultimately to prevail, the Court cannot characterize the suit as meritless (an issue it considered in denying defendant's motion for judgment on the pleadings) or conclude at this stage that plaintiffs have not been injured in their reputations or that "winning is not [their] primary motivation"; so far as it appears, they have brought this suit to "vindicate a legally cognizable right." Id. While defendant correctly points out that the Court must be sensitive to the chilling effect that a defamation suit has on the exercise of First Amendment rights, this suit does not appear to have chilled defendant's exercise of his free speech rights as he continues to publish stories on his website in much the same manner as he did before the lawsuit was filed. Accordingly, it is hereby

ORDERED that defendant's special motion to strike plaintiffs' complaint is DENIED.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: